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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM CARL MCVEY II,

Defendant and Appellant.

G056328

(Super. Ct. No. 13NF4133)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed in part, reversed in part, and remanded with directions.

Robert F. Somers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel, Tami Falkenstein Hennick, and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

William Carl McVey II challenges the trial court's calculation of custody credits for time spent in residential rehabilitation programs. Specifically, McVey claims he is entitled to an additional 295 days of custody credits. While McVey is not entitled to the entire amount, we determine he must be credited another 23 days.

FACTS

In 2013, McVey was charged with several felony Vehicle Code violations related to a drunk driving accident causing great bodily injury and property damage. McVey's prison exposure was nine years and four months. More than four and one-half years later, McVey entered a guilty plea on all charges in January 2018.

From October 2013 through October 2016, the trial court minutes indicate McVey was released on bail on the condition he attend daily self-help meetings. From August 27, 2013 until November 14, 2013, McVey was enrolled in an inpatient residential rehabilitation program at the Pat Moore Foundation for a total of 80 days. On October 29, 2013, the trial court stated "the condition on the bail is that he continue with the Pat Moore Foundation program he's in"

From August 13, 2014, until August 23, 2014, and from October 16, 2014, until November 15, 2014, McVey attended a residential treatment program at Woodglen Recovery Junction (Woodglen) for a total of 42 days. However, it was only on November 10, 2014, after McVey reported he had been attending the inpatient program, the trial court stated, "Sir, you're ordered by the court into the program so you get credit for those."

From February 2, 2015, until May 20, 2015, McVey attended a residential rehabilitation program at the Salvation Army Adult Rehabilitation Center (Salvation Army) for a total of 108 days. On January 22, 2015, defense counsel stated, "Per our discussion in chambers . . . McVey is currently in detox" On March 30, 2015, defense counsel informed the trial court McVey was at the Salvation Army program. The court responded, "Terms and conditions of bail is that he do the Salvation Army

completely and successfully.” The minute order for the March 30, 2015, hearing stated this bail condition.

From June 5, 2015, until July 3, 2015, McVey lived at Action Alliance Sober Living (Action Alliance) for a total of 29 days. There is no record this was a condition of bail. On June 30, 2015, the trial court discussed McVey’s failure to complete the Salvation Army program due to medical reasons and discussed beginning an appropriate program. The court told McVey to do whatever his defense attorney directed him to do. The court vacated the Salvation Army bail term. The minute order noted the Salvation Army condition was removed but did not state McVey was to attend another program of defense counsel’s choosing.

From August 20, 2015, until November 26, 2015, McVey was in a program at Sober Techniques (Sober Tech) for a total of 99 days. On August 31, 2015, the trial court asked if McVey was trying to get into the Salvation Army program. Defense counsel informed the court that McVey could not attend Salvation Army because of a medical condition, so he was in another residential rehabilitation program. The minute order for this hearing does not note anything about a new rehabilitation program.

On September 28, 2015, after viewing a document showing McVey had been in residential rehabilitation since August, the trial court stated it would extend the bond because McVey continued to participate in residential rehabilitation programs. The minute order for this hearing does not mention residential rehabilitation as a condition of bail.

At sentencing, McVey argued he was entitled to 1,158 total days based on his time in jail (574 days), and the following programs: Pat Moore Foundation (78 days); Woodglen (41 days); Salvation Army (107 days); Action Alliance (28 days); Sober Tech (98 days); and Alternative Options (146 days). Specifically, McVey contended the trial court ordered him into residential treatment as a condition of his release. McVey argued that based on the age of this case, different programs were interchanged and approved.

He asserted the following: “His liberty restriction did not change. [He] was not free to work or to live at home with his wife and children. He was not an ‘outpatient’ as a probationer or parolee enjoys, but rather confined to the daily requirements of these programs as well as the requirement that at the end of the day he must report to a location for sleep, curfew and testing.”

The trial court disagreed with McVey. It held the court minutes controlled this issue, even though McVey claimed such minutes were incomplete. The court agreed that Salvation Army was a residential treatment program and McVey was required to reside in that program as a condition of bail as of March 30, 2015. But, the court stated, “I don’t think that allows [McVey] to go backwards and give him credit for time that he was in the program prior to March 30th because the records show he went in on February 2nd.”

The trial court determined as follows: “As it relates to the credit for time served, I am only going to give you credit for time served in which you were in a residential treatment program in which the minutes reflect that it was ordered as a term and condition of your . . . bail. [¶] The first order, according to the minutes, occurred on March 30th, 2015. It was ordered as a term and condition of your bail that you are to complete the Salvation Army. [¶] You were already in the Salvation Army at that point in time. I will give you credits from the day of March 30th of 2015 until the day that you left, which is May 20th of 2015. That would be 52 days credit for that program. You are not entitled to have good time/work time added to that, however, you are entitled to those 52 days. [¶] On June 30th that requirement was lifted. There was no further requirement for you to be in any type of inpatient residential treatment program until October 31, 2015. At that point in time, a term and condition of your bail was added that you complete Sober [Tech]. [¶] I will give you credits from October 31, 2015 until November 26, 2015.” Thus, the court awarded McVey 27 days credit for his time at Sober Tech.

In addition, the trial court concluded: “Your attorney is requesting that I award you credits for time that you were in Alternative Options. The [c]ourt is not willing to do so for two reasons: [¶] One, it was never a condition in the minutes that you complete that. However, more importantly, it appears to the court to be an outpatient treatment program. There’s no indication from Alternative Options that your freedom was curtailed in any manner. It is a sober living home; however, there is no other indication of curtailment of your freedom, nor is there any indication that it was a requirement . . . of your bail. So I’m not awarding you credit for that.” In exchange for his guilty plea, the trial court sentenced McVey to five years in prison, with credit for 735 days as follows: 570 actual days presentencing custody at Orange County jail, 86 conduct credits, and 79 days for court-ordered residential rehabilitation.

The parties agree McVey properly preserved his claim on appeal by filing a written motion prior to sentencing and raising it orally at the sentencing hearing. McVey filed a request to expedite his appeal because, with custody credits, his sentence would conclude in January 2020.

DISCUSSION

“A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered.” (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) A defendant is entitled to custody credit for all days spent “in custody, including, but not limited to, any time spent in a . . . halfway house, rehabilitation facility, hospital, . . . or similar residential institution” (Pen. Code, § 2900.5, subd. (a).)¹ The court imposing the sentence has a duty to calculate the custody credits. (§ 2900.5, subd. (d).)

Custody “credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been

¹ All further statutory references are to the Penal Code.

convicted.” (§ 2900.5, subd. (b).) “Custody” is defined broadly for purposes of section 2900.5 and occurs when a defendant’s behavior is regulated and restricted. (*People v. Davenport* (2007) 148 Cal.App.4th 240, 247 (*Davenport*).) The language defining whether an institution qualifies for custody credit is a question of fact. (*Ibid.* [holding defendant’s stay in rehabilitation program custodial where neither trial court nor prosecution suggested facility did not qualify as custodial]; § 2900.5, subd. (a) [applying a broad definition of qualifying facilities by including listed facilities and “similar residential institution[s]”].) Therefore, the time a defendant spends in a private residential treatment program “as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence” qualifies for presentence custody credit under section 2900.5, subdivision (a). (§ 2900.5, subd. (c); *Davenport*, *supra*, 148 Cal.App.4th at p. 245.)

McVey contends he is entitled to an additional 295 days of custody credit for time spent in residential rehabilitation. Specifically, he asserts he is entitled to the following: 17 days of credit for time at the Pat Moore Foundation; 42 days of credit for time at Woodglen; 108 days of credit for time at the Salvation Army; 29 days of credit for time at Action Alliance; and 99 days of credit for time at Sober Tech.

In reaching its sentencing decision, the trial court examined the entire record, including the court’s minutes, and considered whether each program was ordered as a condition of bail and which facilities qualified for custody credits. The court determined the Alternative Options treatment did not qualify as custodial under section 2900.5, subdivision (a).

The Attorney General concedes “the reporter’s transcripts vaguely refer to the Pat Moore Foundation or Woodglen Recovery as being a condition of bail.” The Attorney General, however, argues we should remand the case to the trial court to determine whether those programs constituted custody under section 2900.5. However, at no time did the court state or the prosecution argue the Pat Moore Foundation or

Woodglen were not qualifying custodial facilities under section 2900.5. Similarly, there is no evidence disputing the time McVey spent in those facilities. Consequently, McVey is entitled to additional custody credits for his time at every facility except Alternative Options as long as the time was court ordered. Furthermore, “[a] remand of this matter, with its attendant delay, will likely result in a loss of credits as defendant is scheduled for release from prison shortly. There is no point in reducing defendant’s meritorious pursuit of custody credits to a pyrrhic victory.” (*Davenport, supra*, 148 Cal.App.4th at p. 247.)

Because the trial court ordered McVey to continue at the Pat Moore Foundation on October 29, 2013, and he remained there until November 14, 2013, we determine McVey is entitled to an additional 17 days of credit. McVey is also entitled to six days of custody credit for his time at Woodglen from November 10, 2014, until November 15, 2014. The court ordered McVey into Woodglen at a hearing on November 10, 2014, “so you get credit for those.” Because November 10, 2014, was the first instance Woodglen was ordered as a condition of McVey’s bail, we do not count his entire time at the facility, but merely the last six days.

The trial court agreed Salvation Army was a residential treatment program and McVey was required to reside in that program as a condition of bail. But, the court stated, “I don’t think that allows [McVey] to go backwards and give him credit for time that he was in the program prior to March 30th because the records show he went in on February 2nd.” The court went on to award McVey 52 days of credit for the program, from March 30, 2015, when it was added as a condition of bail, until he left on May 20, 2015. Substantial evidence supported the court’s factual determination on this issue, and we find no error.

For Sober Tech, McVey claims the trial court correctly categorized the facility as a residential rehabilitation program, but it erred by awarding him 27 days of credit and not 99 days. The court noted Sober Tech was added as a condition of bail on October 31, 2015 until November 26, 2015 (27 days). The court considered McVey’s

argument he was entitled to additional credit for time at Sober Tech, but substantial evidence supports the court's determination that only the time McVey resided at Sober Tech under a court order qualified for credit. We find no error.

McVey asserts he is entitled to an additional 29 days of credit for time at Action Alliance. He contends his time there, from June 5, 2015, to July 3, 2015, was court ordered because he was under an order to attend Salvation Army but was medically unable to attend Salvation Army. We find no evidence Action Alliance was ordered as a condition of McVey's bail.

Finally, we reject McVey's argument that the minute orders should be corrected to reflect the court's order that McVey attend residential rehabilitation as a condition of bail. The trial court reviewed the history of the case and thoroughly considered whether the facilities were categorized as residential rehabilitation programs and scoured the record for any indication McVey's attendance was court ordered. On this record we decline to retroactively impose a generalized condition of bail to attend all residential rehabilitation programs.

DISPOSITION

McVey's request to expedite his appeal is granted. The trial court's sentence is reversed in part. The matter is remanded to the trial court with directions to award McVey an additional 23 days of credit for time served pursuant to section 2900.5 and to forward an amended abstract of judgment reflecting the additional credits to the California Department of Corrections and Rehabilitation, Adult Operations. In all other aspects the sentence is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.